

Decision **DRAFT DECISION OF ALJ WALKER** (Mailed 12/20/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Coastal Cats, Inc. for the Authority to operate scheduled services as a passenger Ocean Ferry Corporation between Santa Barbara and San Diego and ports between and between Marina del Rey and Avalon. Also, on a non-scheduled basis between all of the listed mainland ports and all points on Catalina Island.

Application 05-06-046
(Filed June 28, 2005)

**OPINION DENYING APPLICATION
WITHOUT PREJUDICE TO REFILING**

1. Summary

Coastal Cats, Inc. (Coastal Cats) seeks a vessel common carrier certificate pursuant to Pub. Util. Code §§ 1007-1009 to provide scheduled coastal ocean passenger ferry service with light freight at designated points between Santa Barbara and San Diego, along with scheduled service between Marina del Rey and Avalon on Santa Catalina Island (Catalina). The application has been protested by three other vessel common carriers that question the financial and operational fitness of Coastal Cats and urge that hearings be conducted. In response to questions, the president and chief executive officer of Coastal Cats states that he now resides in Europe and, because of upcoming surgery, will not return to the United States for at least six months. Because a hearing in this matter appears to be necessary, this decision denies the application of Coastal

Cats at this time, without prejudice to refiling of the application when the company's representative is able to participate in hearings.

2. Background

In its application, filed on June 28, 2005, Coastal Cats states that it is "having built" three high-speed 244-passenger catamaran vessels at a cost of about \$5 million each by Kitsap Catamarans LLC in Tacoma, Washington. Coastal Cats states that public funding will be sought for these vessels, and that further funding will be available through a joint venture agreement with United Strategic Alliance, a finance corporation in Las Vegas, Nevada.

Coastal Cats states that its proposed new service will have no competition on the scheduled routes, with the exception of service between Marina del Rey and Avalon. The applicant requests a zone of rate freedom (ZORF) of 20% over or below the basis fares it proposes in its Exhibit C. ZORF is a limited percentage change in fares that a carrier is permitted to make without petitioning the Commission for prior approval. The applicant also requests waiver of Rule 21 of the Rules of Practice and Procedure. Rule 21 lists the data that vessel common carriers are required to submit in an application for operating authority. That data includes a statement of financial ability to render the proposed service. The application contains no financial statement, as required by Rule 21 and Rule 17, and little or no financial information.

As to its qualifications to operate the new service, Coastal Cats cites the experience of its president and chief executive officer, Tony Elliott-Cannon, formerly president of Sea Planes, Inc. (Sea Planes), a vessel common carrier that operates cross-channel ferry service between Marina del Rey and Catalina. Elliott-Cannon states that he resigned from Sea Planes in November 2003 because

of disputes with the company's board of directors and shareholders. No other officers or personnel of Coastal Cats are set forth in the application.

3. Protests to the Application

The application was protested by Sea Planes and Pacific Adventure Cruises, Inc. (Pacific Adventure), each of which asks for an evidentiary hearing on the application, and by Catalina Channel Express, Inc. (Channel Express) which urges that the application be denied on grounds that it fails to provide the Commission with meaningful data to evaluate.

In its protest to the application, Pacific Adventure asserts that the proposed expanded service would in fact compete with existing service. At hearing, Pacific Adventure states that it will show that Coastal Cats will not in its proposal serve public convenience and necessity, and that the carrier lacks financial and operational fitness and has a history of misrepresentations before the Commission.

4. Response to Further Questions

By Administrative Law Judge (ALJ) Ruling dated September 9, 2005, Coastal Cats was asked to respond in writing to certain allegations of the protestants. Specifically, Coastal Cats was directed to respond to the following questions:

- a. Respond to the Sea Planes allegation that Kitsap Catamarans is not building vessels for Coastal Cats and in fact does not offer a vessel with a 244-passenger capacity.
- b. Respond to the Sea Planes allegation that Coastal Cats does not have authority to establish a terminal in Marina del Rey.
- c. Respond to the Sea Planes allegation that Coastal Cats has failed to show financial ability and has failed to comply with Rules 21(i) and 17.
- d. Respond to the Pacific Adventure allegation that prior representations of vessels under construction failed to materialize.

- e. Respond to the Channel Express allegation that Coastal Cats has not shown good cause for the Commission to waive the requirements of Rule 21.
- f. Respond to the Channel Express allegation that Coastal Cats has not described its “joint venture” agreement with a Las Vegas financial institution.
- g. Respond to the Channel Express allegation that obtaining a ZORF must be based on a showing of competition that has not been demonstrated here.

In the same ALJ Ruling, Coastal Cats, Sea Planes, Pacific Adventure and Channel Express were directed to state whether a Commission-sponsored mediation of this application would be useful.

In their responses, all parties agreed that mediation was not likely to resolve differences between the parties. Coastal Cats stated that it could not participate in mediation for at least six months, since its president will be in Europe until that time. As to the substantive questions addressed to it, Coastal Cats had these responses:

- a. It acknowledges that it has discussed but not entered into an agreement with Kitsap for construction of three high-speed catamarans, and that the size of the vessels is yet to be decided. Coastal Cats states that it also has made inquiries for construction of catamarans with boat builders in Huntington Beach and San Diego.
- b. Coastal Cats does not have authority to establish a terminal in Marina del Rey, but it believes that accommodations can be located after the Commission grants a vessel common carrier certificate.
- c. While financial resources are not now in place, Coastal Cats believes it can acquire funding once it has a common carrier certificate.
- d. While Elliott-Cannon as then-president of Sea Planes told the Commission that he hoped to obtain funds to build four \$14 million vessels, those vessels ultimately were not constructed because Sea Planes decided instead to lease vessels with an option to purchase.

- e. Coastal Cats acknowledges that it does not now have financial information to comply with Rule 21, but it argues that as a startup company it must have a license to operate before it can acquire necessary funding.
- f. Coastal Cats declines to reveal information about its joint venture arrangements with a financial institution.
- g. Coastal Cats cannot now show likely competition that would support a request for ZORF rates, but it is willing to modify its request to reflect lesser ZORF rates authorized for other vessel common carriers.

Coastal Cats argues that this Commission has recognized the public need and necessity for a coastwise passenger ferry service between Santa Barbara and ports down to San Diego when it granted authority for such service to Sea Planes in Decision (D.) 01-09-042, while Elliott-Cannon was president of that company. In that decision, the Commission commented:

Sea Planes' proposed service would make Santa Catalina Island significantly more accessible to residents of the greater Los Angeles area because of its greater proximity to communities in west central Los Angeles and the San Fernando Valley than San Pedro and Long Beach, the only Los Angeles area ports where scheduled service is now available. Moreover, Sea Planes intends to integrate this service with its coastwise services to Santa Barbara and San Diego, giving travelers and visitors new options for avoiding the area's crowded freeways. (D.01-09-042, at 3.)

Despite this recognition of the need for the new service, Coastal Cats adds that Sea Planes "failed to embrace the opportunities and initiate service within the prescribed time required by the decision [two years] and consequently their approval for a coastal service expired three years ago." (Response to ALJ Ruling, at 2.)

5. Discussion

An applicant for vessel common carrier authority under Pub. Util. Code §§ 1007-1009 must show, among other things, that (1) the public interest will be

served by the proposed new service; (2) the applicant possesses the requisite qualifications to conduct the new service; (3) the applicant shows the financial and operational capability to proceed; and (4) protests to the application, if any, can be resolved or mitigated. (*See, e.g., In re Catalina Red & White Cruises, Inc.* (2001) D.02-10-037.) Applicant maintains that it now meets or soon will meet each of these tests if the Commission grants it authority to begin its new vessel service within the next two years.

As we did in D.01-09-042, we agree that coastal ferry and light freight service operating in Southern California meets a public need and necessity, given the lack of such service now. Similarly, we may infer that applicant is qualified to operate such a service, having served previously as the president of another existing Catalina ferry service. However, the representation in the application that “Applicants are having built initially three vessels simultaneously” has been shown to be premature, and the complete absence of a financial showing, as required by Rules 21 and 17, casts doubt upon applicant’s operational and financial readiness. Applicant has not rebutted the allegations lodged against it by other vessel carriers.

Normally, we would schedule an evidentiary hearing to create a record upon which the Commission could act, but applicant’s sole representative for various personal reasons will not be available to appear at hearing for many months. Applicant’s suggestion that we simply grant an authorization to proceed within the next two years and permit applicant to work out financial and operational details during that time is not an attractive option. The Commission has stated that it disfavors “the creation of a franchise that could be wielded by the holder as a tool to thwart aspiring competitors from commencing

operation of a needed service.” (*In re Island Navigation Company, Inc.* (2001) D.01-06-024.)

If Coastal Cats desires to secure operating authority when it can better show financial and operational readiness to proceed, and when its representative is available for hearing, if necessary, it may at that time file a new application.

For the reasons stated, the application at this time is denied, without prejudice to refile when applicant is able to participate in hearings, if deemed necessary.

6. Categorization and Need for Hearing

In Resolution ALJ 176-3156 dated July 21, 2005, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. Because three protests have been filed, we affirm the categorization of ratesetting but determine that hearings will be necessary. Applicant’s representative is not available for hearings for at least six months.

7. Comments on Draft Decision

The draft decision of the ALJ was mailed to the parties pursuant to Pub. Util. Code § 311(g)(1) and Rule 77.7(b). No comments on the draft decision have been filed.

8. Assignment of Proceeding

Commissioner John Bohn is the Assigned Commissioner and Glen Walker is the assigned ALJ for this proceeding.

Findings of Fact

1. Coastal Cats is a newly organized California Chapter C type corporation that presently operates no vessel common carrier services.
2. There is a public need for the service proposed by Coastal Cats in this application.

3. Coastal Cats has not shown that it is operationally fit to provide the service that it proposes.

4. Coastal Cats has not shown that it is financially fit to provide the service that it proposes.

5. Coastal Cats is not available for hearing on its application for at least six months.

Conclusions of Law

1. The application of Coastal Cats to provide vessel common carrier service should be denied at this time, without prejudice to refiling when Coastal Cats is prepared to participate in a hearing, if necessary.

2. A.05-06-046 should be closed.

O R D E R

IT IS ORDERED that:

1. The application of Coastal Cats, Inc., for a vessel common carrier certificate pursuant to Pub. Util. Code §§ 1007-1009 is denied, without prejudice to refiling at a later date.

2. Application 05-06-046 is closed.

This order is effective today.

Dated _____, at San Francisco, California.